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SUBJECT: GERMAN COURT DECISION ON MON810 CREATES AGRICULTURAL AND
POLITICAL PROBLEMS

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SENSITIVE BUT UNCLASSIFIED. PLEASE PROTECT ACCORDINGLY.

1. (SBU) SUMMARY. On May 5, the administrative court in Braunschweig rejected Monsanto's request for an injunction against the cultivation ban for MON810. Monsanto contacts report that it is considering an appeal of the decision. The announcement was widely covered by radio, TV, and internet news outlets. Reports indicate that corn seed for up to 20,000 hectares might have an adventitious presence of MON810 at a level of less than 0.1 percent. It is unclear if this seed has been planted. The competent authorities have not yet decided how to handle this issue. Despite the MON810 ban, Federal Agricultural Minister Aigner approved two new biotech events for field trial and additional approvals are expected in coming days. END SUMMARY.

COURT SUPPORT BAN ON MON810

2. (SBU) On May 5, the administrative court in Braunschweig rejected Monsanto's request for an injunction against the cultivation ban for MON810. The court said in its ruling that the level of scientific evidence for environmental damage shown by Minister Aigner (Christian Social Union, CSU) in her action was sufficient to prohibit the cultivation of MON810. In summarizing the positions of various German federal agencies on the issue, the court concluded that the public interest for risk prevention has to be given priority. Specifically, the Federal Office for Nature Protection (BfN), closely associated with the Environment Ministry, supported the ban. The Federal Office for Consumer Protection and Food Safety (BVL), the Federal Research Institute for Agriculture (JKI), the Federal Institute for Risk Assessment (BfR), and the Robert-Koch-Institute (RKI), all more closely associated with the Agriculture Ministry, concluded that there were not sufficient scientific concerns for the cultivation ban.

3. (SBU) In its opinion, the court elaborated at length about the purpose of the safeguard clause in the German Genetech Law and about examples where the precautionary principle had been applied. It stated that the ban is only temporary until the European Commission and the European Council of Ministers have come to a final decision about the safety of MON810. It appears that the court was only interested in the new or additional information which indicated a potential risk. The court also said its role was not to evaluate the presented scientific reports. However, the court pointed out that the cited study of Schmidt et al. (2008 and 2009) demanded further research to explain the observations on the mode of action in non-target species.

NEXT LEGAL STEPS

4. (SBU) Monsanto put out a press release expressing its disappointment with the court decision and indicating that it was

considering an appeal. The appeal must be filed within two weeks, which would expire on May 19. The goal of the appeal would be to get an injunction to lift the ban so that farmers still can plant MON810 corn this year. Regardless of the outcome on the injunction, the administrative court in Braunschweig will next have to evaluate the facts presented in order to decide ultimately if the ban is justified. For this part of the trial, Monsanto has indicated it would be very helpful if the new studies were peer reviewed. In the current situation, the judges in Braunschweig are confronted with contradicting statements about the value of the new studies. It is unknown how long this court proceeding might take.

REACTIONS

¶6. (SBU) German electronic and paper media reported widely on the Braunschweig court decision. Most of these reports were factual without any further comment. Agricultural Minister Aigner reportedly welcomed the decision along with Greenpeace and other NGOs. Greenpeace said in a press release that "environmental and consumer concerns are ranked higher than the interests of large industrial companies. The decision is a success for the majority of the consumers who reject the cultivation of gene-plants." Bavarian Minister President Horst Seehofer (CSU) said that Aigner's decision was courageous and right. He said he interpreted the court decision as an obvious signal towards the agro-company Monsanto, which "acts without regard for the interest of the public." "The stop sign of the court is as obvious as the position of the people opposing commercial cultivation of genetically modified plants."

NEXT PROBLEM: ADVENTITIOUS PRESENCE (AP) OF MON810 SEEDS IN CONVENTIONAL CORN VARIETIES COULD LEAD TO PLOWING UP OF FIELDS

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¶7. (SBU) Various sources indicate that there are in Germany conventional corn seed lots equivalent to 15,000 to 20,000 hectares containing traces of MON810 seeds at a level of less than 0.1 percent. The AP was detected in routine seed tests performed by state authorities during the past two months. The owners of these seed lots, reportedly seed breeders and traders, were informed about the findings and at the time told that this was not a problem because the ban was not yet announced. At this time, it is not clear how much of the corn seed with AP MON810 was planted.

¶8. (SBU) Sources indicate that this problem has been discussed between the various State-level authorities in Germany who reportedly do not want to take any action until the legal situation is absolutely clear. Sources in Bavaria report that the Bavarian Minister for Environment, Markus Soeder (CSU), has approached Federal Agricultural Minister Aigner to ask her advice. Sources say that Soeder is demanding that fields planted with the AP seeds be plowed up. Most of the other States have not yet expressed a view to have the fields plowed. However, one state-level biotech expert has indicated that the states currently intend to act uniformly in all parts of Germany once there is a clear path forward.

¶9. (SBU) Unofficially, the Federal Ministry of Agriculture, Food and Consumer Protection (BMELV) has indicated that its legal interpretation is that the ban does not permit AP of any amount of MON810 in conventional seeds. Aigner has yet to indicate how she wants to move forward on this issue. Agricultural contacts in the Chancellery are extremely concerned that a decision to plow up fields would move the biotech issue onto a completely new level.

¶10. (SBU) Monsanto did not address this topic in its initial court filing in Braunschweig but may do so in an appeal.

AIGNER APPROVES OTHER BIOTECH CROPS FOR FIELD TRIALS

¶11. (SBU) After her decision to ban MON810, Minister Aigner repeatedly stressed that this was not a change in policy and that she would continue to decide biotech event approvals on a case-by-case basis. On April 30, Aigner approved field tests for 20 hectares of starch potato (Amflora) in the state of Mecklenburg-Vorpommern. This was less than the 40 hectares requested by BASF. On May 4, Aigner approved field trial for 9.6

sqm of fungus resistant biotech barley also in the state of Mecklenburg-Vorpommern. The applicant is the University of Giessen, which has a strong program in biotech research. In previous years, several field trials of the barley were destroyed. These were located near the University, north of Frankfurt. In her upcoming trip to Washington (REF B), Aigner will likely point to these actions to show her support of the technology. Sources informally indicate that within the next several days, Aigner is expected to announce the approval of two more field trials for potatoes, but reject another potato field trial application. This event expresses an antibody against cholera. Medical applications of biotechnology are much more widely accepted in Germany, but the field testing of this product will likely be too much for Minister Aigner to support in the current political environment.

112. This cable was coordinated with Consulate General Munich.

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